UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Atwater, CA)

MANUEL E. VIEIRA, INC.
d/b/a A.V. THOMAS PRODUCE
COMPANY

Employer

and Case 32-RC-5301

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION
LOCAL 1096

Petitioner

SUPPLEMENTAL DECISION

A Decision and Direction of Election issued in this case on March 30, 2005, herein called the Decision. In the Decision, I found appropriate a unit that includes employees I found were properly characterized as seasonal employees with a reasonable expectation of employment from year to year. On or about April 12, 2005, the Employer filed a Request for Review of these findings. The Employer's Request for Review has been treated as a motion for reconsideration pursuant to Section 102.65(e) of the Board's Rules and Regulations, as amended. On reconsideration, I adhere to my prior determinations, but issue this supplemental decision to clarify certain findings that were challenged by the Employer.

Actual Reemployment Season-to-Season of the Worker Complement

One of the issues addressed in the Decision was the seasonal employees' expectation of re-employment with the Employer. As I noted in the Decision, there was very limited evidence regarding the Employer telling employees who were being laid-off that they would be re-hired.

Therefore, I considered the actual reemployment rate of the seasonal employees from year to year as part of my determination of the seasonal employees' expectation of re-employment.

As explained in the Decision, the Board has repeatedly found that seasonal employees can be deemed to have a reasonable expectation of future employment where at least 30% of an employer's seasonal employees have previously worked for the Employer. See *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82, 85 (1962) (spring and fall shipping season employees deemed to have sufficient interest in ongoing employment where 38.6% of spring 1962 employees were returnees and 34% of fall 1961 employees were returnees); *Saltwater, Inc.*, 324 NLRB 343 (1997) (describing Board's practice of including seasonal employees whose return rate is in the "30-percent range"). Indeed, I also note a recent Board case (*Winkie Manufacturing Company, Inc. v. NLRB*, 348 F.3d 254, 258 (7th Cir. 2003), enforcing 338 NLRB No. 106 (2003)), in which the U.S. Court of Appeals for the Seventh Circuit upheld the Board's determination that Winkie's seasonal employees had a reasonable expectation of reemployment where Winkie's seasonal employees had only a 27% return rate.[1]

In making a re-employment calculation, the first key question is which employees should be considered. Although the Board decisions I reviewed did not describe the procedure for making the calculation, it does appear that the Board is considering the return rates of the "seasonal employees." For example, *Baumer Foods, Inc.*, 190 NLRB 690 (1971) and *California Vegetable Concentrate*, 137 NLRB 1779 (1962). I therefore chose to exclude the Employer's purported "core group" of full and regular part time employees from the calculation, even though the core group status and full and regular part time status of at least of some of those core group

[1] See also *Kelly Bros. Nurseries, Inc.*, 140 NLRB 82, 85 (1962) (relying upon substantial portion of employees actually returning to work, despite absence of formal recall policy).

employees is still in doubt.[2] The Employer does not contest my exclusion of the core group employees from the re-employment rate calculation.

I next had to decide whether all of the non-core group employees should be considered in the re-employment calculation. I concluded that they should not be considered, and the Employer disagrees with the criteria I chose for determining which of the non-core group employees I would consider for purposes of determining the re-employment rate. In considering which employees I would include in the calculation, I noted that the Employer has an unusual hiring pattern and that this makes an assessment of the re-employment rate somewhat more difficult. In each year, the Employer has three major seasons, each of which has a large spike in employment for a brief period. The three seasons are: Easter, Thanksgiving and Christmas. In addition, the Employer hired a much larger number of employees during the spikes of its 2004 peak periods than it had in prior years, which would have a tendency to artificially lower the re-employment rate between year 2003 and 2004. Another factor that would tend to distort the re-employment rate of truly seasonal employees is the fact that, of the 498 non-core group

[2] As stated in the original decision, there is no evidence in the record regarding the criteria the Employer utilized in the course of preparing the list of 54 persons the Employer considers to be part of its year-round core group of regular full-time and part-time employees (Board Exhibit 6). If core group status is based on some substantial minimum amount of annual hours worked, it is not clear what that minimum is for any particular year, or whether the exhibit contains errors. Although eight of the alleged core group employees worked over 1500 hours in 2003 and 2004, 27 of the employees on the list worked less than 500 hours in 2003. Indeed, one of the employees listed as a "core" regular employee worked only 9.5 hours in 2002 and no hours before or since then. (Employee F10257) Another of the listed "core" employees also worked no hours in 2004. (Employee F122) Yet another oddity is that one of the alleged "core" employees worked only 652.5 hours in 2003 and 720 hours in 2004 (Employee F10180) and another only worked 257.5 hours in 2003 and 589.75 hours in 2004. (Employee F10352)

I also note that there are employees who are not listed as core group employees whose number of hours worked are comparable to employees who are listed as core group employees. See, for example, Employees F21, A461, F617, F746, F791, F865, F870, F898, F919, F957, F1040, F1071, F1113, F10049, F10059, F10087, F10108, A10199, F10224, and F10239. The testimony of the Employer's witnesses also failed to shed light on this matter. For example, Carlos Vieira surmised that Employee No. F10108 would be part of the Employer's regular year-round part-time crew based on his review of this employee's hours (Employer Exhibit 2, Tr. 65) but Employee F10108 is not included on Board Exhibit 6.

employees who were employed by the Employer in 2004, about 96 of them worked for less than 40 hours, and 45 of those 96 employees worked 16 hours or less.

In these circumstances, I chose to exclude those employees who appear to have quit or been fired shortly after being hired, and those who, at most, would be casual employees. I therefore limited my re-employment rate calculation to those employees who had had at least some substantial tie to the Employer during at least one season. Although the Employer argues that my approach is incorrect and not supported by Board law, I have concluded that my approach is consistent with the policy considerations mentioned by the Board in *Sitka Sound Seafoods*, Inc., 325 NLRB 685 (1998). There, the Board stated that when an employer employs both full time and periodic employees, "the Board will utilize a formula to distinguish those employees with a concrete, continuing interest in the employer from those who just happen to have worked there briefly or who do so extremely intermittently." Id. The Board also has acknowledged that, because of the variety of unique hiring patterns for seasonal employees, no one formula will work for all, and the Board is obligated to tailor its general eligibility formulas for seasonal employees to the particular facts of the case.[3] This same logic is applicable to making and assessing the re-employment rate of seasonal employees, and therefore a similarly

[3] *American Zoetrope Productions, Inc.*, 207 NLRB 621, 623 (1973). Similarly, in *Steiny & Co.*, 308 NLRB 1323, 1325-1326 (1992), the Board discussed some of the difficulties inherent in determining eligibility issues, including seasonal employee issues. The Board stated that:

> there is no assurance under any method of determining eligibility that the employees found eligible to vote will continue to work for the employer for a significant period after the election. Even eligible employees working on the day of the election may soon quit, or be discharged or laid off; yet, their votes will determine the representation rights of future employees. Nor, even if we were to make individual determinations with respect to the likelihood of recurrent employment of each employee not currently working, would those determinations be guaranteed to be foolproof. An election necessarily occurs at a single moment in an employer's otherwise fluid work force history. A formula serves as an easily ascertainable, short-hand, and predictable method of enabling the Board expeditiously to determine eligibility by adopting 'a period of time which will likely insure eligibility to the greatest possible number of employees having a direct and substantial interest in the choice of representatives.'" See also *Alabama Drydock Company*, 5 NLRB 149, 156 (1938) (absolute accuracy is unattainable). Id.

flexible approach must be taken in deciding which employees to include in the calculations.

Considering the particular facts of this case, I decided to base my calculation of the re-employment rate of the seasonal employees by considering only those employees who had worked at least 120 hours in the applicable calendar year. I chose this number, because in a case that had some similar issues, the Board had accepted this number of hours as being sufficient to establish seasonal employee status. Id.; and, Cf. *In the Matter of Columbia River Packers Association, Inc*., 40 NLRB 246, 251 (1942) and Swift & Co. 30 NLRB 550, 579-580 (1941) and *DIC Entertainment, L.P*., 328 NLRB 660 (1999). I also concluded that, in determining the re-employment rate of the 2004 employees, I should consider the employees who had worked for the Employer in either or both of the two previous years.[4] As explained in the Decision, in applying the above factors, I concluded that the re-employment rate of the seasonal employees is over 30% and that that re-employment rate supports my conclusion that the seasonal employees had a reasonable expectation of re-employment.

Moreover, even accepting, for purposes of argument, that no hours limitation should be utilized in the course of the re-employment rate calculation, I find that the re-employment rate, based on a consideration of all of the employees who were employed by the Employer, still shows a re-employment rate of over 30% and therefore that such an approach does not, and should not, change the outcome in this case. Thus, in determining the re-employment rate for the 498 non-core group employees who were employed by the Employer in 2004, I determined how many of those non-core group employees were employed by the Employer in either 2002, 2003 or in both years. Using this approach, the re-employment rate was about 37%, not the 16 % figure that was erroneously set forth in the Employer's Request for Review. I also note that

[4] See *Baumer Foods, Inc.*, 190 NLRB 690 (1971) (comparing seasonal return rates in 1968, 1969 and 1970); *Kelly Brothers Nurseries*, 140 NLRB 82 (1962) (comparing seasonal return rates for four seasons over two years).

about 34% of the non-core group employees who were employed by the Employer in 2003 were also employed by the Employer in 2002.[5] Therefore, whether or not the 120 hour limitation is used, the re-employment rates for the 2004 and the 2003 employees exceeded 30% and these figures support the analysis set forth in the Decision.

I will now address the Employer's assertion in its Request for Review that only 16% of the 498 non-core group employees employed in 2004 had been employed by the Employer in 2002, 2003, or in both years. A review of the facts shows how the Employer inadvertently erred in making its calculation. In its Request for Review, the Employer correctly noted that if the 120 hour limit were not used, the total number of non-core group employees employed by the Employer in 2004 is 498. The Employer also was correct that the Region had identified 79 of these employees as having worked for at least 120 hours in 2002, 2003 or in both of those years. The Employer then divided the 498, the number of non-core group employees who had worked any hours in 2004, into 79, the total number of employees who had worked at least 120 hours in 2002, 2003 or both years, and came up with a re-employment rate of 16%. This calculation is incorrect, because, once the 120 limit is set aside, the re-employment rate calculation must be based on how many of the 498 employees worked any hours in 2004, worked any hours in 2002, 2003, or in both years. The records show that 78 of the 498 employees worked for the Employer in 2003, but not in 2002; that 75 of the 498 worked in 2002, but not 2003, and that 34 of the 498 worked for the Employer in both 2002 and 2003, for a total of 187. As 187 of the 498 employees employed in 2004 had been employed by the Employer in 2002, 2003, or both 2002 and 2003, the evidence establishes that the re-employment rate was 37%, not 16%.

[5] The records show that the Employer employed 404 non-core group employees in 2003. 141 of those employees were also employed by the Employer in 2002.

Based on the above factors, I adhere to my earlier decision that it was appropriate and warranted to utilize a 120 annual hour minimum in the course of calculating the re-employment rate of the seasonal employees. I also note that even if that limitation is not imposed, the re-employment rate of the 2004 and 2003 seasonal employees exceeds 30% and thus helps establish that the Employer's seasonal employees have a reasonable expectation of re-employment with the Employer. In view of the above reconsideration of the re-employment rate, and the other factors set forth in the Decision, I adhere to the conclusions set forth in the Decision.

Employer's Recall or Preference Policy

In its Request for Review, the Employer also disputes my finding that the Employer maintained a de facto preference policy in which it favored employees who had worked for it in the past. The Employer argues that the evidence supports only a finding that the Employer prefers to hire employees with prior experience in the packing of sweet potatoes, not that the Employer necessarily prefers to hire employees who derived their packing experience while working for the Employer. The Employer decries the absence of evidence that returning workers were given preference over qualified new applicants who gained their packing experience elsewhere; questions what it characterizes as an unsupported inference that experienced applicants who may be given preference are necessarily returning employees; and asserts that if a true preference policy existed, the number of returning employees would exceed the number of new employees.. Finally, the Employer also argues that, in deciding that the Employer had a de facto hiring preference, I relied on inaccurately characterized testimony by the Employer's supervisor, Cruz Gutierrez, regarding his use of a list of employees he keeps, and that I ignored contrary evidence by Gutierrez.[6]

[6] The Employer rightly points out that the Decision at footnote 15 was not entirely correct where it indicated that the list was not introduced as an exhibit. Instead, the list (Board Exhibit 10) is missing from the record, and the

After considering the Employer's arguments, I conclude that I was correct when I concluded in the Decision that the Employer does have a de facto preference policy. The Employer records show that over one-third of the employees employed by the Employer in 2003 and 2004 had previously been employed by the Employer. Gutierrez testified without contradiction that all former employees who applied for employment in 2004 were hired. The Employer admits that it gave preference to employees with experience, and clearly the most applicable experience for the Employer's jobs and practices was prior experience with the Employer.[7] Therefore, I have determined that I need not decide the credibility of Gutierrez's various claims about the list, because even without reliance on the statements from Gutierrez that I listed in the Decision,[8] I conclude that the evidence as a whole warrants the conclusion that the Employer has a de facto hiring preference.[9] In particular, the high re-employment rates amply support the existence of the Employer's preference policy in this case. See *Musgrave Manufacturing Company*, 124 NLRB 258, 261 (1959); *Bogus Basin Recreation Association*, 212 NLRB 833 (1974); *Aspen Skiing Corp.*, 143 NLRB 707, 711 (1963); *Micro Metalizing Co.*, 134 NLRB 293 (1962) (preference given to former employees in rehiring supports inclusion of

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circumstances in which it was omitted from the record are not evident. See Tr. 432-436. In any event, I do not find the omission of the list from the record to be problematic given the Board cases that establish that a preference policy may exist even in the absence of a formal list.

[7] While the Employer has pointed to portions of the transcript which it contends reflect the Employer's practice of valuing all prior packing experience and not merely experience obtained with the Employer, I note the existence of contrary testimony where the language of the questions and answers appears to presuppose that the experience valued by the Employer is obtained through previous employment with the Employer rather than elsewhere. See, e.g., Tr. 79, 271, 280. In any event, given my reliance upon the actual return rates as discussed above, I do not need to resolve this conflict in testimony among the Employer's own witnesses.

[8] I note that, in addition to the Gutierrez statements referenced in the Employer's Request for Review, which are at least arguably contrary to the Gutierrez statements referenced in the Decision, I note that Gutierrez gave additional testimony that appears to be consistent with the testimony I included in the Decision. (E.g., Tr. 219, 277, 308, 319.)

[9] To the extent the Employer considers the record deficient insofar as it is missing a "key piece of evidence" that returning workers were hired in preference over qualified new applicants who gained packing experience elsewhere, a characterization with which I disagree, the Employer furnishes no explanation as to why it failed to offer such evidence at the time of the original hearing.

regular seasonal employees even where no preferential hiring list is utilized); Accord: *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780 (1962).

For all of these reasons, I adhere to my conclusions that the Employer uses a de facto preference policy, and that this preference policy is among the factors which support my conclusion that the employees in this case must be considered seasonal rather than casual, and that they should therefore be included in the unit, subject to the eligibility formula adopted in the original Decision and Direction of Election.

CONCLUSION

For all of the reasons set forth in the previously issued Decision and Direction of Election in this case, as supplemented by my findings and conclusions in this Supplemental Decision, I reaffirm my conclusion that certain of the Employer's employees are seasonal employees with a reasonable expectation of re-employment and that they should be included in the unit. I adhere to the eligibility tests included in the Decision, and I will proceed with the applicable provisions of the Direction of Election that is included in the Decision.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 15, 2005.** The request may **not** be filed by facsimile.[10]

Dated: June1, 2005

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[10] In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.